# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Argument | 7 |
| Conclusion | 12 |


## CITATIONS


Cases:

*Admiral Corp.*, 3 Trade Reg. Rep. ¶ 17, 230 — 11

*Beatrice Foods, Inc.*, 3 Trade Reg. Rep. ¶ 17, 311 — 11

*Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, certiorari denied, 369 U.S. 888 — 5

*Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 — 6, 7, 8

*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 — 10

*Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47, certiorari denied, 380 U.S. 906. — 9

Statute:

Section 2 of the Clayton Act, 49 Stat. 1526, 15 U.S.C. 13 — 2, 4, 6, 7, 8, 10, 11




216-740—66——1

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., A CORPORATION,
PETITIONER

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–3a) is reported at 1965 Trade Cases ¶ 71,491; it has not yet been officially reported. The first decision of the Federal Trade Commission is reported at 57 F.T.C. 1036. Its decision on remand is reported at Trade Reg. Rep. (1963–1965 Transfer Binder) ¶ 16,753; it has not yet been officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965, and a timely petition for rehearing *en banc* was denied on October 14, 1965. On January 6, 1966, Mr. Justice Stewart granted an exten-

sion of time within which to file a petition for certiorari to and including March 14, 1966, and the petition was filed on March 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner proved that its discriminatory promotional allowances were "good faith" efforts to meet competition within the meaning of Section 2(b) of the Clayton Act, as amended.

2. Whether delay occasioned by petitioner's successful appeal from the Federal Trade Commission's first order denied petitioner due process.

## STATUTES INVOLVED

Section 2 of the Clayton Act, as amended, provides in pertinent part (49 Stat. 1526, 15 U.S.C. 13):

> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.
>
> * * * * *

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

## STATEMENT

Petitioner is a major producer and distributor of brassieres, selling to retail stores throughout the United States. In 1954 it initiated a series of cooperative advertising plans under which it made payments to some of its customers in partial reimbursement of their cost of local newspaper advertisements featuring petitioner's product (R. 204).[1] Under its original plan, which was in effect prior to 1956, petitioner paid 60 percent of the cost of single advertisements consisting of at least 400 lines. If a customer ran five such advertisements within a six-month period, however, he was reimbursed for 70 percent of his cost; and if he ran eight such advertisements, he received 80 percent (R. 204).[2]

[1] "R" refers to the joint appendix filed in the court below.

[2] The plan was subsequently amended on two occasions. In 1956, the lineage required was reduced to 200 lines, and the scale of payments for multiple advertisements was altered. In 1957,

In 1957, the Federal Trade Commission issued a complaint alleging that Exquisite, in making payments for cooperative advertising, as well as certain payments of "push money" to employees of a few customers, had violated Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(d) (R. 4–9).[3] After full evidentiary hearings, the Commission in 1960 issued its decision, in which it found violations of Section 2(d) both in petitioner's payments for cooperative advertising and in the "push money" payments.[4] At that time, the Commission took the position that the "meeting competition" defense of Section 2(b) was inapplicable in a Section 2(d) proceeding, and it therefore did not permit petitioner to introduce evidence to establish such a defense. The Court of Appeals for the District of Columbia Circuit affirmed the Commission's findings and conclusions that petitioner had *prima facie* violated Section 2(d), but held that petitioner should have

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the plan was changed to provide an allowance of 50 percent for each 200-line advertisement with no increase for multiple advertisements (R. 204).

[3] The complaint was subsequently amended to include an allegation that petitioner violated Section 2(e) of the Act as well. The Commission's finding of Section 2(e) violation was affirmed by the court of appeals and is no longer at issue in the proceeding.

[4] The Commission found, for example, that petitioner's cooperative advertising allowance plan was "inherently discriminatory" because its terms were unsuitable to the needs of many smaller customers; that the plan was not even offered to some customers in competition with favored customers; that some customers who were informed of the plan were not told of subsequent changes in it; and that petitioner did not abide by the terms of its plan—giving some customers larger allowances than the plan called for, and others smaller allowances (see R. 205–208).

been allowed to prove that its discriminatory allowances had been made in good faith to meet competition. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499, 506, certiorari denied, 369 U.S. 888.

On remand, the Commission opened the record and gave petitioner a full hearing on its defense. At the hearing, petitioner introduced in evidence a list of advertisements of competitors' products placed by seven of the many customers it had favored with discriminatory allowances. The list had been compiled strictly for use in the Commission proceeding—by going through old newspapers (R. 210). Petitioner argued that this compilation demonstrated that the advertisements of its products followed and were in response to advertisements of competing products. The Commission, however, found that such evidence was equivocal and incapable by itself of demonstrating that petitioner's payments to the favored customers were knowing responses to competitors' offers (R. 210–212).

Next, petitioner contended that, in general, its cooperative-advertising allowance plan had been adopted in good faith to counter similar plans of competitors (R. 213–214). In support of this contention, petitioner introduced evidence regarding the basic terms of the cooperative advertising plans that its competitors had had in effect at the time of its payments to the favored customers (R. 215). The Commission noted, however, that even if this contention were correct, petitioner could not prevail, having failed to inform some customers of the existence of the plan,

having failed to adhere to the terms of the plan in actual performance (R. 207–208), and having failed to show that its payments under the plan were necessary responses to the actions of competitors in particular competitive situations (R. 213–214). The Commission went on to reject the contention itself. The Commission found that since petitioner's plan was more discriminatory than any competitor's and was apparently used as an offensive tool to enlarge petitioner's market share rather than as a defensive measure, the plan was not a "good faith" effort to meet competition (R. 218).

In addition to finding that petitioner had failed to prove its 2(b) defense, the Commission found that petitioner had been afforded a fair opportunity to establish the defense, thereby rejecting petitioner's contention that the Commission was required to recall all the witnesses who testified at the original hearing so that petitioner might attempt to establish its affirmative defense through cross-examination. The Commission further concluded that petitioner had not been unreasonably hindered in its defense by the lapse of four years between the time that the complaint was originally issued and the hearing on remand, when it was first permitted to put on its case (R. 219–220).

The Commission's cease and desist order was unanimously affirmed on appeal to the Court of Appeals for the District of Columbia Circuit (Pet. 1a–3a). The court of appeals relied upon this Court's decision in a Section 2(a) price-discrimination case, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S.

746, for the proposition that lawful meeting of competition is limited to "a specific act aimed at a lower price on the part of a competitor in 'individual competitive situations, rather than * * * [in] a general system of competition.'" (Pet. 3a.) It saw no reason why the same rule should not apply to advertising allowances in a Section 2(d) case. The court agreed with the Commission's conclusion that the list of competitors' advertisements, unexplained by any testimony, was insufficient to demonstrate that petitioner's discriminatory allowances had been made to meet competition in individual competitive situations as required by *Staley*. The court did not discuss petitioner's claims that due process required the Commission to recall all of the witnesses for cross-examination by petitioner's counsel and that delay had deprived petitioner of a fair opportunity to present its defense.

## ARGUMENT

The decision below is clearly correct, and further review is not warranted.

1. The standard by which the Commission judged petitioner's "meeting competition" defense was that of *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746. In that case this Court stated (324 U.S. at 759–760) that a successful Section 2(b) defense

> * * * at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the

> granting of a lower price would in fact meet the equally low price of a competitor. * * *[5]

This standard is a factual one, and this Court in *Staley* emphasized that the "appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." (324 U.S. at 760.) In the present case, the Commission found (R. 209) that petitioner did not have the requisite knowledge of competitors' offers when it made the challenged advertising payments to favored customers. The court of appeals upheld these findings. Their correctness is not an issue warranting consideration by this Court, and in any event it is not open to serious question.

Petitioner's effort to demonstrate its awareness of the existence of comparable offers by its competitors rested solely upon general evidence that advertising allowances are commonly granted retailers in the industry, coupled with evidence that seven of the favored customers had in fact placed advertisements featuring products of other brassiere manufacturers (Statement, *supra,* p. 5). Such evidence indicated nothing, however, about petitioner's *awareness* of competitors' offers to the favored customers; there was absolutely no evidence that petitioner knew these customers were receiving allowances and reasonably believed that it must meet such allowances. Indeed, it is possible that petitioner itself, not any of its competitors, in fact initiated co-operative advertising payments to the customers in question. The Commis-

[5] It is not contended that the meeting-competition defense is essentially different when advanced in a discriminatory-allowance case under Section 2(d), as here, rather than a price-discrimination case under Section 2(a), as in *Staley* (Pet. 14).

sion was thus entitled to reject petitioner's showing as wholly equivocal and unpersuasive (R. 212).

The Commission's opinion makes clear that the defects in petitioner's showing of good faith extended far beyond the mere inability of petitioner to identify the particular competitor whose offer it was meeting and to specify the precise amount of that offer. Accordingly, petitioner's reliance on *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47 (C.A. 1), certiorari denied, 380 U.S. 906, is misplaced. Although the court in *Forster* held that it would be "unrealistic" to require the seller to show knowledge of the precise amount offered and the particular competitor offering the lower price (335 F. 2d at 56), it did not question the requirement of *Staley* that the seller demonstrate *some* knowledge of comparable offers by competitors prior to offering a discriminatory allowance. No such knowledge was shown here.

It is surely no answer for petitioner to argue that its plan was designed to be generally responsive to similar plans of its competitors. For, as the Commission found, petitioner completely failed to inform many of its customers of the existence of its co-operative advertising program (R. 207–208) and on a number of occasions granted some customers a greater allowance, and others a smaller allowance, than they were entitled to under the formal terms of its plan (R. 205–206); further, petitioner's plan, considered as a whole, went substantially beyond any competitor's in discriminating against small customers (R. 216–217). The plan in short was not tailored to actual competitive need and was more discriminatory than

competition warranted. As the Commission concluded, a discriminatory plan "adopted as a general competitive measure to secure a larger share of the market and unrelated to a particular competitive situation is not within the protection of the Section 2(b) defense" (R. 214, citing this Court's *Staley* decision, 324 U.S. at 753, and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419).

2. Petitioner's procedural contention—that it was denied a fair opportunity to establish its Section 2(b) defense—is without merit. It complains first of the Commission's refusal to recall in the remand hearing the witnesses "relied upon by counsel supporting the complaint for the *prima facie* charge" (Pet. 24). During the course of the proceedings on remand, the Commission's examiner ruled that petitioner must be responsible for calling whatever witnesses it wished to rely upon, using the same compulsory process available to counsel supporting the complaint (R. 236–237). Petitioner requested no subpoenas and made no showing that witnesses were unavailable. Its complaint is thus in essence that it had a right to establish a meeting-competition defense through cross-examination of complaint counsel's witnesses who testified on the distinct issue whether petitioner's allowances were *prima facie* unlawful under Section 2(d). But questions as to whether the favored customers had also received offers from sellers in competition with petitioner would have been outside the scope of their direct testimony. In the circumstances, it was perfectly reasonable to require petitioner, rather than the Commission, to take the ini-

tiative in recalling the witnesses by whom petitioner sought to establish its affirmative defense.

Petitioner next complains that it was denied a fair opportunity to present its Section 2(b) defense because of the lapse of time between the conduct challenged in the complaint and the Commission proceeding on remand. The Commission itself has expressly recognized that there may be cases in which such delay may so prejudice a party's ability to defend itself as to require dismissal of its complaint, in whole or in part (see *Admiral Corp.*, 3 Trade Reg. Rep. ¶ 17,230; cf. *Beatrice Foods, Inc.*, 3 Trade Reg. Rep. ¶ 17,311). But it correctly found that this was not such a case. Lapse of time does not necessarily preclude an effective defense, and petitioner in the present case made no showing that any prejudice actually resulted here—that witnesses were not available or could not be located, or that their memories were bad, etc.[6]

[6] Petitioner did attempt to make a specific showing of prejudice in one minor aspect of the case: it contended that the one customer that had received "push money" payments had gone out of business and its records were no longer available. Even here, however, petitioner offered no explanation why its own records and the testimony of its own officials would not be adequate. Petitioner's alternative contention (Pet. 30–31) that the Commission was required to dismiss the "push money" charge as *de minimis* was first raised after the initial court of appeals decision, which affirmed all of the Commission's findings of *prima facie* violation, and is in any event fully answered in the Commission's opinion, which notes (R. 220) that the "push money" payments, while small, were "part and parcel of sales transactions and other advertising grants to this favored retailer which were clearly not *de minimis*." In addition, the point is largely moot since the Commission's finding of violation with respect to the "push money" payments did not affect the scope of the cease and desist order that it entered (R. 202).

By its very nature this was a defense best provable by the testimony and records of petitioner's officers, and no showing was made as to how and why the delay made such proof difficult or impossible.

## CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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